UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

VIRGO MEDICAL SERVICES, INC.

Employer

and **Case 04-RC-104485**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION, LOCAL NO. 115

Petitioner

Norton H. Brainard, III, Esq., Counsel for the Petitioner
Gary L. Lieber Esq. and Henry F. Warnock, Esq., Counsel for the Employer
Deena Kobell Esq., Counsel for the Regional Director

DECISION

Raymond P. Green, Administrative Law Judge. I heard this case in Philadelphia, Pennsylvania on January 15, 2015.

The Petition in this case was filed on May 7, 2013. Pursuant to a Decision and Direction of Election issued on June 20, 2013, a secret ballot election was conducted by mail on July 16, 2013. The unit was as follows:

> Included: All full-time, regular part-time and per-diem, (working 20 hours or more per week), drivers, dispatchers, and on-site coordinator employed by the Employer at its Philadelphia, Pennsylvania facility.
>
> Excluded: All other employees, operations managers, guards and supervisors as defined in the Act.

Although there were a number of challenged ballots that initially were determinative, the parties subsequently stipulated to the eligibility of those challenged voters. As a result, a revised Tally of Ballots showed that 13 votes were cast for the Union, 6 votes were cast against representation, 3 cast void ballots and there were no remaining challenged ballots. Accordingly, the challenges were not determinative and a majority of the ballots were cast for the Union.

In addition, the parties stipulated that another person, Tanisha Melton, was not an eligible voter and that her challenged ballot should not be opened. Therefore, there were 26 eligible voters. It is noted that three eligible voters did not cast ballots and three others, Carmen Jones, Clevell Stockton, and Mark Wright cast ballots that were deemed void because they did not correctly follow the instructions sent to them with the mail ballots.

The employer filed timely Objections to the Election. At the hearing it withdrew Objections 7 and 8. Therefore the remaining Objections were:

Objections 1 and 2 essentially allege that the Union and its agents told employees that if they voted yes they would not have to pay union initiation fees.

Objection 3 alleges that the Union and its agents told employees that they must vote yes.

Objection 4 alleges that the Union and its agents told employees that they already were union members.

Objection 5 alleges that the Union threatened employees that if they did not vote for the Union, patients would be told that certain employees did not support the Union. The employer asserts that these statements were constituted threats of discharge because they would discourage patients from riding with anti-union drivers, thereby threatening their jobs.

Objection 6 is simply a summary of Objections 1 through 5 and does not allege any additional conduct.

Objection 9 alleges that when some employees returned unsigned envelopes, the NLRB did not send those voters duplicate sets with letters explaining that their failure to sign the envelope would render such votes void.

Objection 10 alleges that the decision by the Regional Director to utilize a mail ballot procedure was unreasonable and arbitrary.

Objection 11 alleges that the manner in which the mail ballot election was conducted was confusing and undermined the ability of the employees to have a fair election.

Objection 12 simply summarizes Objections 7 through 11 and does not allege any other conduct.

Objections 1 to 6

Inasmuch as no evidence was offered to support Objections 3, 4 and 5, these are overruled.

As to Objections 1 and 2, the employer offered testimony to support its claim that the Union told employees that if they joined the Union prior to the election they would not have to pay initiation fees and therefore save $200.00. It is contended that these statements were made by Duane Miree, an employee who it asserts was the Union's agent.

The employer's evidence was based on the testimony of three individuals, two of whom testified that they heard Miree make these statements and the third who testified that the first two told him that they heard Miree make these statements.

Desmond Brickle, the day dispatcher, testified that in late June or early July, he heard Miree boasting to other employees that there was going to be a union here and that Miree said; "I'm going to put it to you like this. If you get down now, you ain't got to pay no fee."

Marlyn Williams, who is employed as an onsite coordinator at the Philadelphia Veteran's Hospital, testified that Miree told her and that she heard him tell a couple of other drivers, that if they joined now they would save $200. She also volunteered that she was against the Union

because she believed that she was a supervisor and that a union at the facility would undermine her authority. She testified that she did not attend any union meetings and essentially threw away, without reading, any literature that was mailed to her by the Union.

Rodney Arrington, the employer's Philadelphia Operations Manager, testified that although he never personally heard Miree make such statements, Williams and Brickle told him about the $200 initiation fee.

For his part, Miree denied telling any employees that if they joined the Union before the election that the Union would waive any initiation fees.

Robert Freiling, the union representative responsible for this campaign, testified that at multiple meetings that he had with the employees at the union hall, both before and after the petition was filed, he responded to questions about initiation fees and dues. He credibly testified that he told employees that the Union does not charge or ask for dues from employees until it has obtained a ratified contract with the employer. Specifically as to initiation fees, he testified that the Union's policy is to waive the $200 initiation fee for any employee who is employed by the employer before a contract is reached and ratified and that the only employees subject to the initiation fee would be those who are hired after a contract is ratified. Freiling further testified that he held between 6 and 12 pre-election meetings and that these were scheduled for weekends in order to accommodate most of the employees.

Neither Marlyn Williams nor Desmond Brickle attended any of the union meetings, inasmuch as both had already made up their minds to vote against union representation.

The evidence shows that Miree, along with about three other employees solicited union authorization cards and distributed union literature. There was no evidence that he was actually authorized by the Union to speak on its behalf about the Union's policy with respect to dues and initiation fees.

In my opinion, it is more probable than not that Miree may have misunderstood the statements made by Freiling about initiation fees and dues and that he may have transmitted that misunderstanding to a couple of employees in the course of conversations at the work place. [1]

In support of its position that the Union is responsible for Miree's statements, the employer cites *Davlan Engineering Inc*, 283 NLRB 803, 804-05 (1987). In that case, the Board concluded that union card solicitors are "special agents" for purposes of initiation waiver statements made to employees. The Board stated:

> When a union makes authorization cards available to employees with the understanding that they will solicit other employees to sign them, it thereby vests the solicitors with actual authority to obtain signed cards on its behalf. See Restatement *2d, Agency* (1958). Additionally, when a union permits or acquiesces in employees' soliciting on its behalf without indicating to third parties that such solicitation is unauthorized, it thereby vests the solicitors with apparent

[1] In this respect, I am going to credit Williams and Brickle because given the fact that initiation fees were in fact discussed by a union representative at meetings with employees and the fact that the explanation can be confusing, it seems likely that an employee such as Miree could have misunderstood the explanation and conveyed incorrect information to other employees at the work place.

authority to obtain signed cards on its behalf. In both cases, whether by action or inaction, the union has created a special agency relationship for the limited purpose of card solicitation. See Restatement *2d, Agency § 3* (1958). Accordingly, the union will be deemed responsible for representations concerning its fee waiver policies made by its special agent solicitors, whether or not they have been specifically authorized or instructed to speak on this subject. See generally Restatement 2d, *Agency §* 161A, 162 (1985).

A union may avoid responsibility for the improper fee-waiver statements of its solicitors, however, by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards. Such publicity may take any number - of forms including, for example, an explanation of the fee-waiver policy printed on the authorization card itself -A union that fails to take adequate steps to provide the employees with an explanation- of its policy acts at its peril.

Notwithstanding my conclusion that Miree probably made statements to a couple of employees to the effect that the Union would waive the initiation fee if they joined before the election, I conclude that this should not be sufficient to overturn the election. The evidence shows that employees attended union meetings prior to the election and that Freiling, the Union's business agent, explained the Union's policy with respect to initiation fees and dues. Inasmuch as I conclude that the Union, by Freiling, explained the Union's initiation fee policy in a manner that would not be prohibited by *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1971), I am going to overrule these Objections.

Objections 9 through 12

No evidence was presented to support Objections 9 and 11. Those Objections are therefore overruled.

The remaining Objections essentially allege that the Regional Director abused his discretion in ordering that a mail ballot be held.

As noted above, the Decision and Direction of Election was issued on June 20, 2013. It did not order a mail ballot election as neither party made a request for that type of election.

On June 24, the Region's Field Examiner, sent an e-mail to employer's counsel in an effort to set up the election. She stated that the election should be scheduled no earlier than 25 days after the Decision and Direction of Election and no later than the 30th day. She suggested that the election be held on July 15 or 16 and inquired as to when most of the drivers reported to work.

On June 25, the employer's counsel sent an email suggesting that the election take place on July 24 because he and the employer's representative would on vacation.

On June 25, the Board agent sent another email stating that the Region did not have any flexibility on dates and that if the employer did not agree to hold the election before the 30th day after the Decision and Direction of Election, the Regional Director would unilaterally select a date after consulting the parties. She inquired if there was an hour in the morning and an hour in the afternoon when most drivers would be present at the employer's Philadelphia facility.

On June 26, at 9:46 a.m., Respondent's counsel sent an email to the Board agent suggesting that the election be held on July 19 from 4:00 p.m. to 4:45 p.m. He also stated that the employer's facility was under construction. He asked that she call him that afternoon.

On June 26, at 9:47 a.m., the Board agent sent an email stating that she would call in the afternoon. She also indicated that she wanted to know if most of the employees would be working during "that time period."

On June 26 at 9:55 a.m., the employer's counsel emailed that he was told that these hours were when the drivers came in for their assignments.

On June 26 at 11:08 a.m., the Board agent sent an email to the employer's counsel. This stated that although the Regional Director would set the date for the election, she wanted his input. She stated that the election would be held between 25 and 30 days after the Decision and Direction of Election and that the employer had previously suggested that it be held on July 19 from 4:00 p.m. to 4:45 p.m. at the employer's facility located on Haines street in Philadelphia. In addition, she indicated that it was her understanding that the starting times for the drivers was staggered throughout the day so that they reported to work from 3:30 a.m. to 3:00 p.m. Because she had concerns that few if any drivers would be at the facility at the employer's proposed time, (4:00 p.m. to 4:45 p.m.), she asked what the employer's practice was regarding meetings and training. She suggested that the election could be held at the Veterans Administration and stated inter alia, that the Regional Director would be willing to agree to have two, 2 hour sessions; one in the morning and one in the late afternoon. After inquiring as to the condition of the employer's building that was under renovation, the Board agent suggested that the other alternative would be a mail ballot election. She asked for the employer's input by the end of the business day.

On June 27 at 2:50 p.m., the Board agent sent an email to the employer's counsel stating that she had not heard anything further as to whether drivers would or would not be on the premises from 4:00 p.m. to 4:45 p.m. She started that by looking at past manifests and assuming that most of the drivers worked 8 hour shifts, it appeared unlikely that many of the drivers would be on the premises during that time period. She asked for further information and stated that she was prepared to recommend a mail ballot election.

On June 27 at 3:18 p.m., the employer's counsel sent an email stating that he was trying to work this out but was not available until June 28.

On June 28, at 10:19 a.m., the Board agent sent an email to the employer's counsel stating that if she did not hear from him by 2:00 p.m., she would recommend that the election be held by mail ballot.

On June 28, at 11:57 a.m., the employer's counsel sent an email suggesting that the election be held during the hours of noon to 2 p.m. and from 3:30 to 4:00 p.m. Although not expressly stated, I assume that he agreed that the election should be held on July 19, 2013.

On July 1, the Board agent sent an email to the parties stating that the Regional Director had decided on having a mail ballot election because of the drivers' staggered schedules and because of traffic and other variables that could be encountered by drivers transporting patients to medical appointments.

By letter dated July 3, 2013, the Regional Director notified the parties that the election would be held by a mail ballot. This set forth the details to the effect that the ballots would be

mailed to voters on July 16, 2013 at 5:00 p.m.; that ballots had to be received at the Regional Office by July 30, 2014; and that the ballots would be counted on July 31, 2013.

Although the employer filed a Request for Review of the Regional Director's Decision and Direction of Election, its appeal to the Board was based on other issues and it did not raise the issue of whether a mail ballot election was appropriate. It is also noted that although the Union did not request that the election be conducted by a mail ballot, it notified the Region that it had no objection.

The Board has held that voting may be conducted by mail, in whole or in part where circumstances warrant. The Board has stated that mail ballot elections are used in unusual circumstances, particularly where eligible voters are scattered either because of their duties or their work schedules or in situations where there is a strike, picketing, or lockout in progress. The Regional Director is required to consider the use of a mail ballot after taking into consideration the desires of the parties, the ability of voters to understand mail ballots, and the efficient use of Board personnel. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). See also *Willamette Industries*, 322 NLRB 856 (1997); *London's Farm Dairy*, 323 NLRB 1057 (1997); and *Reynolds Wheels International*, 323 NLRB 1062 (1997).

In *CPMC St. Lukes Hospital*, 357 NLRB No. 21 (2011) a Board majority, in a Decision denying a petition to review a Regional Director's Decision and Direction of election, concluded that the Regional Director did not abuse his discretion in ordering that the election be conducted by a mail ballot where the parties could not reach agreement on the time and manner of an election and where the employees were scattered by virtue of their work schedules. Member Hayes dissented and would have ordered a manual election. He stated, in part, that given the procedural issues and reliability concerns associated with mail ballot elections, he would limit their use to extraordinary circumstances.

In *Austal USA, LLC*, 357 NLRB No. 40, (2011), the Board granted a petitioner's appeal of a Regional Directors Direction of Election and remanded the case so that the Regional Director could explain how she exercised her discretion over the location of voting and whether the election should be held onsite or by mail. In this case, there were two previous elections, each of which had been set aside because of multiple unfair labor practices committed by the employer. When the Regional Director made the arrangements for a third election, the petitioner objected to the election being conducted on the employer's premises and requested either that it be conducted off premises or that it be conducted by a mail ballot. The employer opposed and the Regional Director informed the parties that the election would take place on the employer's premises. In this case, the Board remanded the matter to the Regional Director stating that the Director had to consider the petitioner's objection to holding a third election on the employer's premises and whether or not the election should be conducted by mail ballot.

In a very recent Order issued in *Covanta Honolulu Resource Recovery Venture*, 2-RC-140392 (January 20, 2015), the Board granted the employers request for special permission to appeal the Regional Director's direction of a mail ballot election. By a majority vote, it concluded that the Director did not abuse his discretion. Footnote 1 shows that Member Miscimarra's dissented. This stated:

> A manual ballot election is presumptively appropriate. *Nouveau Elevator Industries,* 326 NLRB 470, 471 (1998). Here, a manual election would overlap with all unit employees' scheduled shifts if held on certain consecutive days in any given week. Although considerations related to the year end holiday season might suggest that dates in early January 2015 were more appropriate

than attempting to hold the election on December 30 and 31, 2014 – which would mean a manual election would exceed by a few days the goal of holding elections within 30 days after the date of Decision and Direction of Election (D&DE) – the Regional Director has the discretion to extend the 30-day period, and satisfying the 30-day goal is not a factor that justifies a mail ballot election. See NLRB Case handling Manual (Part Two) Representation Proceedings §§ 11284, 11301.2, 11302.1, 11284; see also *San Diego Gas & Electric,* 325 NLRB 1143 (1998). Moreover, the mail ballot election has likewise, and predictably, resulted in a time frame of more than 30 days between the date of the D&DE and the election's completion. For these reasons, Member Miscimarra believes the relevant facts do not overcome the presumption in favor of a manual election, and he would find that it constituted an abuse of discretion to order a mail ballot election in these circumstances.

The Petitioner contends that the employer's objection to having a mail ballot election should have been raised in a Request for Review of the Regional Directors Direction of Election. No doubt this could have been done after receiving the Regional Director's letter dated July 3, 2013. And I note that all of the cases cited above dealing with this question have been in the context of a party, (whether a union or employer), asserting in a Request for Review and not in the context of Objections to an Election, that the Regional Director had abused his or her discretion in deciding whether or not to have a mail ballot election. Indeed, it makes a good deal of sense to require that this issue be raised before the election is held so that the Board and the parties do not incur the time and expense of holding a mail ballot election only to have it potentially nullified by a post election objection.

I also think that the Regional Director's Decision to hold a mail ballot election in these circumstances was not an abuse of discretion. The fact is that the voters in this election were drivers who throughout the day, took patients to and from medical appointments in Philadelphia. They received their assignments on the day before and their arrival times at the facility on Haines Street was staggered over a period of between 3:30 a.m. and 3:00 p.m. Additionally, there was a group of about 4 drivers who had to drive about 90 miles before even arriving in Philadelphia in order to pick up their passengers. Moreover, information available to the Region at the time that the election was directed was that the facility to which the employees reported was under reconstruction and may not even have been suitable for holding a manual election.

It seems to me that one of the reasons that a mail ballot election was ordered in this case was to meet a time target set by the Regional Director. While there may be an argument that meeting a time target of 30 days should not be a sufficient ground to hold a mail ballot election, it is my opinion that the Regional Director had other sufficient grounds for concluding that a mail ballot election was appropriate based on the information available to him at the time.

Recognizing that mail ballot elections come attended with difficulties involving whether voters make errors in following the instructions for the handling and mailing of their ballots, I do not think that the Regional Director abused his discretion. I therefore shall overrule these Objections.

Conclusions of Law

The Union did not engage in objectionable conduct warranting setting aside the election and the Regional Director was within his discretion in directing that the election be conducted by a mail ballot.

ORDER

The representation case should be remanded to the Regional Director of Region 4 for the purpose of issuing the appropriate Certification. [2]

Dated, Washington, D.C. February 24, 2015

Raymond P. Green
Administrative Law Judge

[2] Under the provision of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by March 10, 2015.